

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Improving Competitive Broadband Access to)	GN Docket No. 17-142
Multiple Tenant Environments)	
)	
Petition for Preemption of Article 52 of the San)	MB Docket No. 17-91
Francisco Police Code Filed by the Multifamily)	
Broadband Council)	
)	

COMMENTS OF STARRY, INC.

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August 30, 2019

SUMMARY

The Commission has taken significant steps to improve broadband deployment and connectivity across the United States. However, a massive barrier to deployment and competition still exists in the last hundred feet. Incumbent fixed providers have created a monopolistic block to competitive entry in Multiple Tenant Environments (MTEs), in direct contradiction to the Commission's rules and pro-competition policy.

Through the use of a variety of contract provisions and scare tactics, incumbent providers have systematically blocked competitors' ability to provide service to MTEs in thousands of buildings across the country. These provisions – tiered and exclusive revenue share, exclusive marketing, exclusive wiring, and exclusive rooftop access – serve no legitimate purpose. These provisions are specifically designed to create legal and economic barriers to new entry in MTEs, and to disincentivize MTE owners from allowing new providers to serve their buildings.

Residents in MTEs suffer as a result of these anti-competitive practices; they may have fewer choices for broadband at higher prices. As incumbents continue to raise prices on broadband year-after-year, it is imperative that the Commission facilitate a robust and competitive market for broadband. But there is a market failure – incumbents serving MTEs are not competing on price or service quality.

To address this failure, Starry asks that the Commission prohibit all exclusive provisions, and specifically tiered and exclusive revenue share, exclusive marketing, exclusive wiring, and exclusive rooftop access provisions in agreements between providers and MTEs. In addition to these explicit prohibitions – but not in place of them – Starry suggests the Commission establish a multi-stakeholder group to create a “Gigabit Ready” checklist for MTEs to ensure that they are wired for high-speed broadband services and that they have neutral and open access to their buildings. This would help improve wiring and access in buildings across the country and would provide prospective residents with a tangible way to verify competitive broadband availability within MTEs. Finally, we urge the Commission to take action in its separate proceeding to update and modernize the over-the-air reception device rules to expedite the deployment of fixed wireless broadband.

We urge the Commission to take advantage of this opportunity to enhance the Country's digital broadband infrastructure in MTEs, and act quickly to improve broadband competition in MTEs by creating a fair and level playing field for all providers.

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COMMENTS OF STARRY, INC.

Starry, Inc. (Starry)¹ submits these comments in strong support of the Federal Communications Commission’s (FCC or Commission) proposals to increase competition in Multiple Tenant Environments (MTEs) by addressing the significant anti-competitive barriers facing new-entrant broadband providers in MTEs.² For decades, incumbent providers in MTEs have systematically erected economic and legal barriers to competitive entry into MTEs, to consumers’ detriment. These barriers serve no legitimate purpose and inhibit broadband competition in large and small communities across the country. The time has come for the Commission to take comprehensive action against these practices and establish a level and fair playing field on which providers of all services in MTEs compete for customers on service quality and price, without any anti-competitive advantage.

The Commission has taken significant steps in recent years to stimulate broadband infrastructure deployment and to improve broadband access in unserved and underserved communities.³ MTE access presents the last hurdle – it’s the last hundred feet in which

¹ Starry, Inc., is a Boston- and New York-based technology company that is utilizing millimeter waves to re-imagine last-mile broadband access as an alternative to fixed wireline broadband. Starry is currently deploying its proprietary fixed 5G wireless technology in the Boston, Washington, DC, Los Angeles, New York City, and Denver areas, with plans to expand to our presence to additional U.S. cities through 2019.

² *Improving Competitive Broadband Access to Multiple Tenant Environments; Petition for Preemption of Article 52 of the San Francisco Policy Code Filed by the Multifamily Broadband Council*; GN Docket No. 17-142, MB Docket No. 17-91; Notice of Proposed Rulemaking and Declaratory Ruling, FCC No. 19-65 (rel. July 12, 2019) (*NPRM*).

³ See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018); *Connect America Fund Phase II Auction Support for 375 Winning Bids Ready to Be Authorized*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, DA 19-825 (WCB,

incumbents still wield monopolistic power to prevent competition. And this has an outsized impact on affordable communities and low-income residents.

As a new entrant broadband provider in cities across the country with the majority of its subscribers in MTEs, Starry has a unique perspective on these issues across localities, incumbent providers, and MTE owners and managers. The incumbent playbook is almost universal: use a variety of contract provisions – like tiered revenue share and exclusive marketing – and scare tactics to create what are effectively exclusive access agreements. The residents in these MTEs suffer the consequences; they have fewer choices for broadband and may face higher prices. The incumbent provider gets the benefit of skirting the FCC’s rules and pro-competition policies, and willingly shares a portion of its revenue with the building owner to tighten its anti-competitive grip.

We urge the Commission to improve broadband competition in MTEs and level the playing field by prohibiting tiered and exclusive revenue share, exclusive marketing, exclusive wiring, and exclusive rooftop access provisions in agreements with MTEs. The Commission should also prohibit clear that exclusive provisions of all kinds, given incumbents’ demonstrated efforts to thwart Commission intent by using alternative contractual arrangements to avoid explicitly prohibited terms.

Starry works closely with building owners across the country to bring our competitive service to their residents. We understand that building owners have a strong interest in ensuring that providers in their buildings meet theirs’ and their residents’ needs without causing harm to the property, and sometimes do so through access agreements. We are specifically focused on the provisions of those agreements that serve no legitimate purpose other than to block competition and benefit no party other than the incumbent provider.

In addition, we note that in addition to addressing these anti-competitive provisions, the Commission has an opportunity to more comprehensively improve broadband access in MTEs by providing guidance and leadership to MTE owners and developers. As more MTEs are constructed and renovated, it’s a natural opportunity to improve competition and infrastructure in MTEs. Specifically, we suggest the Commission work with a multi-stakeholder group to create a new “Gigabit Ready” checklist for MTE owners and developers, which would provide owners,

rel. Aug. 26, 2019); *Rural Digital Opportunity Fund*; *Connect America Fund*; WC Docket No. 19-126, WC Docket No. 10-90, Notice of Proposed Rulemaking, FCC 19-77 (rel. Aug. 2, 2019).

developers, and residents a clear checklist and self-certification of buildings that are wired for high-speed broadband and have neutral and open access for all providers.

I. THERE IS AN OVERRIDING PUBLIC INTEREST IN ENSURING RESIDENTS IN MTEs HAVE ACCESS TO COMPETITIVE BROADBAND SERVICES

Growing numbers of Americans live in MTEs and rely on their broadband connections to support every facet of their lives, including for work, for entertainment, for staying in touch with loved ones, and for countless other activities.⁴ Unfortunately, MTE residents are subject to the anti-competitive behavior of incumbents, which intentionally inhibit their access to competitive broadband services.

According to the U.S. Census Bureau, as of 2017 there were 35 million housing units in MTEs, accounting for 26% of all housing units in the United States.⁵ This number is likely to continue to rise in the near and medium term. MTE housing construction is at a decade high; in February 2019 there were almost 600,000 private multifamily housing units under construction, compared with just 374,000 delivered in February 2014, and 346,000 delivered in 2017.⁶ And the average multitenant housing developments are skewing larger – between 2013 and 2017 the number of units in private MTEs with 50 or more units increased by 20%.⁷

These MTEs are not just located in urban areas – in fact, suburban apartment stock is higher than in central business districts by a rate of 6 to 1.⁸ And MTE residents are not just young consumers – millennials and baby boomers are competing for the same units in MTEs.⁹

⁴ See, e.g., NPRM at ¶ 2; Starry, *New Survey Data Finds Broadband Choice Drives Apartment Rental Decisions*, Press Release (May 30, 2019) (*Starry Survey Results*), <https://dyajmw2sca9cs.cloudfront.net/press/pdf/Starry+Survey+Press+Release-FINAL.pdf>.

⁵ U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimate, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B25024&prodType=table; U.S. Census Bureau, *2017 National - Housing Unit Characteristics - All Housing Units*, https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=a00000&s_year=n2017&s_tableName=Table0&s_byGroup1=a16&s_byGroup2=a1&s_filterGroup1=t1&s_filterGroup2=g1&s_show=S.

⁶ Marisa Lifschutz, *Key Construction Drivers (Part 3): Multifamily Trends*, IBISWORLD (Apr. 16, 2019), <https://www.ibisworld.com/industry-insider/analyst-insights/key-construction-drivers-part-3-multifamily-trends/>; National Multifamily Housing Council, Quick Facts: New Construction, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-new-construction/#Multifamily-Starts-and-Completions>.

⁷ See U.S. Census Bureau – American Housing Survey Table Creator, <https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html> (comparing results from 2013 and 2017).

⁸ See Barbara Byrne Denham, Victor Calanog, *Has the Multifamily Market Growth Been Stronger in Urban or Suburban Settings?*, NATIONAL REAL ESTATE INVESTOR (Dec. 12, 2017), <https://www.nreionline.com/multifamily/has-multifamily-market-growth-been-stronger-urban-or-suburban-settings>.

⁹ See Patrick Sisson, Jeff Andrews, and Alex Bazeley, *The Affordable Housing Crisis, Explained*, CURBED (May 15, 2019), <https://www.curbed.com/2019/5/15/18617763/affordable-housing-policy-rent-real-estate-apartment>.

Starry's own analysis shows that residents in MTEs place significant value in access to competitive, well-priced broadband services. Among subscribers who responded to a survey, more than 46% said that they consider broadband provider options when deciding where to live. Other studies have shown similar results – a recent study found that renters in MDUs rate high-speed and reliable broadband as the most important amenity.¹⁰

Furthermore, more than 85% of respondents in Starry's survey said that cost was their biggest issue with their previous provider. Over a quarter of subscribers work from home 10 to 19 hours per week. And more than 94% use video streaming services.¹¹ In total, this paints a picture of a subscriber who is an MTE dweller; who strongly considers the availability of broadband in their housing choices; who is very cost sensitive; and who relies on their connection for work, play, and everything in between.

In Starry's experience, the level of competition in MTEs across the country varies on a building-by-building basis. And that makes sense – access to MTEs is typically controlled by each building owner or manager. So, while there may be multiple broadband providers present in a market, the availability of competitive services in individual buildings can vary greatly. That variance is likely largely a result of incumbents' anti-competitive practices.

Residents in MTEs have a lower median income than the average U.S. household.¹² Renters are also paying a higher proportion of their income on rent – approximately 38% pay over 30% or more of their pretax income on rent.¹³ A National Low Income Housing Coalition study found that there is not a single county in the U.S. where a renter earning minimum wage and working 40 hours per week can afford a two bedroom apartment.¹⁴

¹⁰ Michael Render, RVA, LLC, *The Tangible Value of Advanced Broadband to MDUs* at 9 (June 2019) (*The Tangible Value of Advanced Broadband to MDUs*), <http://glenechogroup.isebox.net/ftthconnect/> (reporting that access to high-speed and reliable broadband is the most important amenity in an MDU).

¹¹ *Starry Survey Results*.

¹² The median income of residents who own or rent MTEs in 2017 was \$36,201, while the median income of all households was \$60,336. See National Multifamily Housing Council, *Quick Facts: Resident Demographics*, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/#RentOwn>; Gloria G. Guzman, U.S. Census Bureau, *American Community Survey Briefs, Household Income 2017* (Sept. 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/acsbr17-01.pdf>.

¹³ See Susan K. Urahn, Travis Plunkett, *American Families Face a Growing Rent Burden*, PEW Charitable Trusts (Apr. 2018), https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf.

¹⁴ National Low Income Housing Coalition, *Out of Reach 2019* at 1, https://reports.nlihc.org/sites/default/files/orr/OOR_2019.pdf.

The lack of competition among internet service providers has translated into high costs for broadband-only connections.¹⁵ The cost of standalone broadband today from large incumbents ranges from \$70-90 per month including equipment and other fees, and cost is most often cited by consumers as the most prevalent barrier to adoption.¹⁶

In short, a significant and growing number of consumers in the U.S. live in MTEs, including a larger proportion of low-income Americans. These consumers deserve reasonably priced, high-quality broadband services.¹⁷ Without effective competition, incumbent providers have no incentive to improve quality or reduce price – in fact, broadband prices have risen steadily over the last decade for all consumers.¹⁸

There are many market-based barriers to starting a competitive broadband service – most acutely, it's a capital-intensive business. However, if a company is able to finance the construction of a network, build a business and brand focused on providing quality service to customers, and develop relationships with building owners to bring new competitive service to their buildings, that new entrant should not be stymied by anti-competitive contract provisions that exist solely as barriers to entry.

We strongly urge the Commission to fix this problem now by removing the significant anti-competitive barriers erected by incumbents through tiered and exclusive revenue share, exclusive marketing, exclusive wiring, and exclusive rooftop provisions.

II. INCUMBENT BROADBAND PROVIDERS ARE SYSTEMATICALLY BLOCKING COMPETITIVE PROVIDERS' ACCESS TO MTEs

Incumbent broadband providers have created layers of complicated legal and economic barriers to new entry into MTEs in markets all across the U.S. The incumbents share the same strategy – use exclusive contract provisions to create exclusive access agreements and confuse

¹⁵ Carl Weinschenk, *Report: U.S. Median Broadband Price is \$80 Monthly*, TELECOMPETITOR (Aug. 8, 2017), <https://www.telecompetitor.com/report-u-s-median-broadband-price-is-80-monthly/>; Niall McCarthy, *The Most and Least Expensive Countries for Broadband*, FORBES (Nov. 22, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/11/22/the-most-and-least-expensive-countries-for-broadband-infographic/#21540b8d23ef>.

¹⁶ Daniel Frankel, *Comcast to Lead Doubling of Consumer Broadband Pricing, Analyst Says*, FIERCEWIRELESS (Oct. 2, 2017), <https://www.fiercevideo.com/cable/comcast-to-lead-doubling-consumer-broadband-pricing-analyst-says>; *Exclusive: Spectrum Is Reportedly Raising Its TV & Internet Pricing (Broadcast TV Fee Will Soon Be \$13.50 a Month)*, CORD CUTTERS NEWS (Aug. 24, 2019) (*Spectrum Price Increase*), <https://www.cordcuttersnews.com/exclusive-spectrum-is-reportedly-raising-its-tv-internet-pricing-broadcast-tv-fee-will-soon-be-13-50-a-month/>; Nick Reese, *In Spite of Speed and Infrastructure Increases, the FCC Concludes That American Price-to-Value Is High Compared to Other Developed Countries*, BROADBANDNOW (Feb. 5, 2018), <https://broadbandnow.com/report/2018-fcc-international-data-insights/>.

¹⁷ See NPRM at ¶ 14.

¹⁸ And most recently, reports indicate that the nation's second largest cable provider that it is increasing the price for its standalone broadband product to \$70 per month. See *Spectrum Price Increase*.

building owners and managers into thinking they carry legal risk for allowing new entrants to serve the building.

Exclusive provisions serve no legitimate purpose other than to create barriers to new providers entering an MTE and are not in the MTE owners' interest. These provisions are put in place not at the MTE's request, but at the incumbent provider's insistence.

The economics of serving an MTE are straightforward. The provider seeks to maximize the penetration in the building and minimize the churn in order to reduce the payback period per building – that is, maximize the profit from the building as quickly as possible. One strategy for achieving this is to provide a high-quality, well-priced service that consumers genuinely enjoy using. Another strategy is to use monopolistic tools to minimize competitive entry in the building. Unfortunately for consumers, incumbent providers have opted for the second strategy.

In instances where the Commission has adopted helpful rules to enhance and protect competition in MTEs,¹⁹ incumbent providers develop new provisions to serve the same anti-competitive purposes. Once the Commission prohibited exclusive access agreements, incumbents came to rely on combinations of revenue share, exclusive marketing, exclusive wiring, and flat out scare tactics to try to prevent successful competition in MTEs. These provisions and tactics are baldly anti-competitive. Instead of this monopolistic approach, Starry strongly suggests that the Commission level the playing field and make providers in MTEs compete on price and service quality alone, without any unfair barrier.

While some MTE owners are large, sophisticated companies that rely on experienced outside counsel to represent them in negotiations with providers, many are small owners that may have fewer resources to engage in a negotiation with a large incumbent's legal department. In those cases, the inclusion of a revenue share – or just a straight payment for access – distracts the owner or manager from the broader impact that the exclusive provisions will have on their residents. And in all cases, the existence of exclusive provisions and revenue share within agreements complicates and protracts the negotiation and due diligence processes, delaying the delivery of competitive broadband services to MTE residents. Instead of allowing monopolistic

¹⁹ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 1 (2007) (*2007 Exclusive Service Contracts Order*), *aff'd*, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

tactics, Starry strongly suggests that the Commission level the playing field and make providers in MTEs compete on price and service quality alone.

Because most access agreements contain confidentiality provisions, new entrants rarely have access to the existing agreements. However, based on our experience negotiating agreements with thousands of buildings, we provide real-world examples below of how these anti-competitive tactics impact building owners, residents, and new entrants.

III. THE COMMISSION SHOULD ENHANCE COMPETITION IN MTEs BY PROHIBITING ALL ANTI-COMPETITIVE CONTRACT PROVISIONS

The public interest would be best served by a market environment in which MTE owners and managers are incentivized to maximize competitive offerings in their buildings. Unfortunately, for all the reasons described herein, there is a market failure, and there are real anti-competitive barriers that exist solely to benefit incumbent providers. These barriers harm competition, and ultimately, consumers in MTEs across the country. We strongly urge the Commission to solve this marketplace failure in order to create an environment in which all providers are competing on price and service quality, and so that incumbents no longer exploit contractual advantages to significantly slant the market in their favor.

We specifically urge the Commission to prohibit tiered and exclusive revenue share,²⁰ exclusive marketing, exclusive wiring, and exclusive rooftop access provisions in any form of agreement between an MTE and a provider. We also urge the Commission to prohibit exclusive provisions of all kinds to prevent incumbents' from using different terms and provisions to achieve the same anti-competitive goals.

A. The Commission Should Prohibit Tiered and Exclusive Revenue Share

Payments from incumbent providers to buildings are presented as a form of compensation to the building for the right to serve their residents. However, this ignores the fact that in many cases these fees are willingly offered by the incumbent provider, not requested by the building owner. While building owners do benefit some from these payments, which provide a relatively small ancillary revenue stream, their true purpose is to create an economic barrier to entry.

²⁰ A per-subscriber revenue share or a per-unit fee are more appropriate and more closely aligned with a typical business arrangement, so long as the fees are reasonable and nominal, and any existing agreement with such fees is provided to new entrants before or during the negotiation process. We note that we rely on bulk billing arrangements in certain circumstances as part of our Starry Connect service, where we provide service to residents in affordable housing developments – in those circumstances, Starry may bill the building owner, who then provides the service for free or at low cost to its residents.

These payments take two forms – access payments (door fees) and revenue shares of various types. Access payments are one-time fees that an incumbent will pay a building for access to the building.²¹ These are typically calculated as a set dollar amount per unit in the building.²² This is not tied to a cost to the building – it’s merely an enticement to the building, and implicitly, a barrier to others because the building is likely to require later-in-time providers to make the same payment.

Revenue sharing agreements are less legitimate and are more pervasive. Revenue sharing is generally a tiered structure in which the percentage of revenue paid to the building increases proportionally with the provider’s penetration in that building.²³ This is specifically designed to i) incentivize the building to help the incumbent provider maximize the number of subscribers in the building; and ii) act as an economic penalty if the building allows a new entrant into the building. This is because as the new entrant wins subscribers from the incumbent – even if the new entrant agrees to the same tiered revenue share – the revenue share from the new entrant will be lower per subscriber than the revenue share from the incumbent. This intentionally creates an economic disincentive for the building to allow competitive providers in the building. It does not serve any other legitimate purpose – the revenue share increase is not associated with any increased cost for the provider or the building.

Starry is also aware that some incumbent providers have exclusive revenue share provisions in place with MTE owners, which prohibit an MTE owner from accepting any form of compensation from any other provider. This creates an obvious and harmful disincentive to the MTE owner to allow new competition in the building. While revenue share as a percent of the overall revenue that a building generates is nominal, it’s difficult for any business to justify a decrease in revenue from one revenue source without an offset from another. Like all other exclusive provisions, exclusive revenue share serves no legitimate purpose other than to inhibit new entry in an MTE – it is an exclusive access agreement by another name.

Building owners are the gatekeeper to residents in MTEs – in most cases, it’s not possible to serve a building’s residents without the building owner’s permission. Starry works closely with building owners of all sizes to help improve the availability of broadband services in their

²¹ See *NPRM* at ¶ 13.

²² *Id.*

²³ See Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, *WIRED* (June 26, 2016), <https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/>.

buildings. And many MTE owners recognize that competitive broadband helps improve resident satisfaction and reduce resident churn,²⁴ which is far more valuable to the MTE owner than the ancillary revenue from revenue share. But in some cases, buildings are hesitant to take any action that they may believe – correctly or incorrectly – would violate the terms of the agreement they have with the incumbent.

The Commission can remove this anti-competitive barrier by prohibiting the economic provisions that serve no legitimate purpose, specifically tiered revenue share agreements and exclusive revenue sharing agreements.

B. The Commission Should Prohibit Exclusive Marketing

In many cases, incumbents will also pressure buildings to enter into exclusive marketing agreements either in conjunction with a revenue share or as a stand-alone restriction. Exclusive marketing agreements create marketplace distortions by not allowing a new entrant to effectively advertise the existence of the service at the place its most logical – in the building itself. Generally, these agreements prevent the new entrant from holding sales events in the building or from advertising anywhere in the building, and prevent the building owner from advertising the service to its residents. It is obvious on their face that these exclusive agreements serve no purpose other than to disadvantage a new competitive provider in the building.

Unfortunately, these agreements are very effective. Starry utilizes a variety of sales techniques to acquire new subscribers, including digital marketing, physical marketing, direct mail, and a variety of in-person campaigns. Among all of our customer acquisition activities, in person sales are the most effective – approximately 20% of our subscribers are acquired directly from an in person or in building activity. This would likely be much higher but for exclusive marketing agreements that prevent us from holding in person events or engaging in direct sales activity. This is likely true for all new entrants – we are small enough that we do not have universal brand recognition, and in-person sales events are an effective way to build brand awareness. In buildings with exclusive marketing agreements, we are likely to gain less share than in buildings in which we can actively market in the building.

These exclusions serve no purpose other than to prevent successful competition. It's that simple. And they have a particularly harmful effect when paired with revenue sharing agreements and tiered revenue sharing agreements. Consider a building with a tiered revenue

²⁴ *The Tangible Value of Advanced Broadband to MDUs* at 9.

share in place with an incumbent. Not only is the revenue share itself designed to disincentivize an MTE from allowing a new entrant, the impact is exaggerated because it will be nearly impossible for the new entrant to achieve significant penetration. As a result, the building will perpetually “loose” revenue share from every subscriber a new entrant wins, because it will always be at a lower revenue share rate associated with a lower penetration level. And residents suffer with fewer choices and without the benefits of competition, including lower prices and better services.

The Commission should recognize the detrimental effect that exclusive marketing agreements have on competition and should prohibit them in all forms.

C. The Commission Should Prohibit Exclusive Wiring and Exclusive Rooftop Access

Exclusivity arrangements extend beyond basic economic and marketing limitations to cover physical wiring and physical access. Like other exclusive and anti-competitive provisions, these serve limited practical purposes other than to inhibit competition in MTEs.

Incumbents typically pursue exclusive wiring rights as another barrier to competitors’ ability to access a building. Exclusive wiring arrangements take various forms, including sale-and-leaseback, exclusive access to existing wiring, or exclusive access to aspects or components of wiring or conduit. Starry concedes that if a provider installs building wiring at its own expense, and is using it to serve a customer, it may have an interest in recouping a portion of that cost for a short period of time. In such cases, however, the Commission should make clear that exclusivity should last only so long as a) the incumbent is using the wire to serve a customer; and b) no longer than necessary to allow the provider to recoup the investment.

In other cases, Starry is aware that incumbents may require exclusive access to wiring that already exists in a building and belongs to the owner. This is wiring that the incumbent did not install, assumed no cost of construction for, and otherwise has no right to use. Nonetheless, the incumbent will include a provision in its access agreement that gives it the exclusive right to use the wiring for an extended period of time and may bolster that right by seeking an easement or other quasi-property right to the wire or conduit (which again, it did not install). There is no justification for this type of provision, other than to prohibit competitive entry into the building, plain and simple.

In buildings with exclusive wiring agreements, a new entrant is far less likely to enter because of the upfront cost of wiring the entire building. And as raised by the Commission in the

NPRM, an exclusive wiring agreement in a building that will not permit the construction necessary to install a new wire is the equivalent of an exclusive access agreement.²⁵

Similarly, exclusive access to rooftops (or common areas, pathways, or conduit) serves no legitimate purpose and should be prohibited. If a provider is serving a building using a fixed wireless connection, there is no reason why that provider would need exclusive access to the roof. Fixed wireless equipment tends to be small in size, so there is no safety or operational reason to prohibit additional fixed wireless equipment from being installed on a roof. As a fixed wireless operator, our business depends on our ability to place transceivers located on the roof of an MTE to receive a signal from one or more base stations. If we are unable to place an antenna in near line-of-sight to a base station, we cannot serve the building.

Again, these provisions are all part of a systematic approach by incumbents to take every step possible to create effective exclusive access agreements. The Commission should correct this marketplace failure and prohibit exclusive wiring and exclusive rooftop access agreements, and any other contract provision that inhibits a competitor's ability to access wiring or deploy new wiring.

D. In the Absence of Prohibitions, the Commission Should Require Clear and Transparent Disclosures

As noted above, most access agreements contain confidentiality provisions, so new entrants rarely see the provisions of the building's existing agreements. However, during the negotiation process with an MTE owner or manager these provisions are usually raised, particularly with respect to revenue share. Further, in many cases, the building owner or manager may not have a copy of the agreement, but may know that there is something about "exclusivity" in the agreement and will be hesitant to enter into any new agreement as a result (but will require an access agreement nonetheless).

The Commission seeks comment on whether disclosure of the existence of these agreements would have a positive effect on competition in MTEs.²⁶ We believe it would, but only on the margins. Disclosure would ostensibly serve two purposes: 1) it would allow the tenants to better understand whether these agreements are in place (implicitly, why they do not

²⁵ *NPRM* at ¶ 26.

²⁶ *Id.* at ¶¶ 19, 28.

have broadband choices); and 2) it would give new entrants helpful information as they negotiate access agreements.

With respect to the tenants, transparency regarding the existence of exclusive provisions may have little impact. Individual tenants in an MTE tend to lack negotiating power, either with an owner board or with a building owner and manager. Presumably, if disclosure was uniform across all buildings, a tenant would be able to consider the existence of these agreements at the point at which they make their housing decisions. However, that would require residents to be extremely educated about what these provisions mean in practice and as they relate to the services they may receive and the prices they may pay. It would also require that the disclosure be made in a very consistent manner across all buildings, and well in advance of the time at which a potential resident makes a housing decision. To that end, to the extent the Commission decides to require MTE owners to provide information to tenants about the existence of exclusive agreements, such disclosures must:

- Be provided at the time that a rental tenant submits a rental application or sooner;
- Be provided to a purchaser in advance of the execution of a contract;
- Be persistently posted in a common area of the building and in any electronic building management system available to residents;
- Be provided upon request to any prospective or current tenant or owner; and
- Make very specific and uniform disclosures about the type of agreement in place, the terms of the agreement, and the impact on the resident.

Disclosure would more meaningfully improve competitive providers' ability to negotiate effectively with the building owner or manager. In most cases, competitive providers are negotiating in the dark – we do not know the precise financial or legal details of other agreements. And, we frequently face building owners or managers who believe that the terms of an agreement say something they likely do not – specifically that they are not exclusive access agreements. If we had universal access to incumbent agreements, including those with exclusive provisions, we would be better able to negotiate agreements that meet a building's needs.

Again, while providing disclosures of the existence of these agreements and the specific terms will help, it is only on the margins. The Commission has an opportunity now to meaningfully correct this significant market failure by prohibiting these harmful provisions outright.

IV. THE COMMISSION CAN HELP IMPROVE THE AVAILABILITY OF COMPETITIVE BROADBAND SERVICES BY UPDATING THE OTARD RULE TO APPLY TO FIXED WIRELESS BASE STATIONS

The Commission seeks comment on state and local programs that succeed in improving competition, deployment, and access to broadband in MTE buildings.²⁷ State and local governments have a pivotal role in the deployment of broadband, and the Commission should continue to collaborate with them to improve broadband access and competition across the country.

With respect to fixed wireless providers, Starry encourages the Commission to update and modernize the over-the-air reception device (OTARD) rules consistent with the proposals in its *OTARD Modernization NPRM*.²⁸ For a variety of reasons, fixed wireless providers continue to face significant delays in the local permitting process for fixed wireless base stations, despite the limited number needed to serve a community and the *de minimis* aesthetic impact they may have on the community.²⁹

The Commission's proposed rule change is a balanced approach to help streamline the siting process for fixed wireless networks – which have a minimal impact on the surrounding community – while respecting the rights of state and local governments and home owners' associations to adopt reasonable restrictions to achieve a public safety objective or preserve historic properties. We urge the Commission to take final action in this proceeding to update and modernize the OTARD rule to reduce the timelines and cost of deploying competitive fixed wireless broadband services in communities across the country.

V. THE COMMISSION SHOULD ALSO ESTABLISH BEST PRACTICES AND EDUCATIONAL MATERIALS FOR MTE OWNERS

Ultimately, competition in MTEs is a national imperative that the Commission can help drive through regulatory and other means. As a matter of national policy, MTE owners should consider broadband access and competition starting at the construction phase of their buildings and when renovating their buildings, and they should consider competition as they negotiate access agreements. But MTE owners and managers are not incentivized to do so and are often pressured into making anti-competitive decisions by incumbent providers. This is a marketplace

²⁷ *Id.* at ¶¶ 30-31.

²⁸ *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Notice of Proposed Rulemaking, FCC No. 19-36, (rel. Apr. 12, 2019) (*OTARD Modernization NPRM*).

²⁹ Comments of Starry, Inc., WT Docket No. 19-71 (filed June 3, 2019).

failure – incumbent providers are using economic incentives and scare tactics to restrict competition, instead of focusing on providing a better service at a better cost.

In addition to prohibiting the types of agreements discussed here, the Commission can also help improve competition in MTEs through two additional actions. First, it could work with private and public sector stakeholders to create a “Gigabit Ready” program. It could create this program through a multi-stakeholder process that would include real estate owners, multifamily stakeholders, service providers, and municipal leaders who all have a stake in improving broadband in communities and buildings across the country. The program would include a voluntary checklist designed to ensure that new buildings and renovated buildings are appropriately wired for high-speed broadband service and require that the wiring be neutrally available to any provider to promote broadband competition within a building. A Gigabit Ready building could carry an identifier that potential residents would be able to recognize and use to help make their living decisions.

As noted, the U.S. is building more MTE units than ever. The Commission has a unique opportunity to help improve U.S. digital infrastructure in the last hundred feet and help improve competition by promoting these best practices. This could create marketplace incentives for buildings to take an active role in facilitating competition in their buildings as a resident acquisition and retainment tool. It would also provide potential residents an easy and verified way to determine the availability of competitive, high-speed broadband in the MTE.

Second, the Commission could create an educational website that MTE owners and managers could reference to better understand what is and is not permitted in access agreements. It could explain that exclusive access agreements, tiered revenue share, exclusive revenue share, exclusive marketing, exclusive wiring, and exclusive rooftop provisions are prohibited. It could also provide more plain-language explanation of the inside wiring rules, and potentially model terms to help ensure competition within the MTE. This would reduce the friction to entering into agreements between MTEs and broadband providers and improve transparency for all parties.

To be clear, these actions are in no way a replacement for meaningful and powerful action the Commission needs to take to eliminate anti-competitive barriers in MTEs. But, combined with clear prohibitions of anti-competitive provisions, as discussed herein, these two actions could enhance marketplace solutions and facilitate better service and more competition within MTEs.

VI. CONCLUSION

Starry strongly supports the Commission's proposals to enhanced broadband competition in MTEs. Incumbent providers have benefited from their anti-competitive actions for too long, and only to their benefit. The Commission can build on its significant efforts to improve broadband deployment and availability by addressing these significant barriers to competition in MTEs. By doing so, the Commission can fix a marketplace failure and improve competition to 35 million households in communities all across the U.S.

Respectfully submitted,
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August 30, 2019